

Respondent argues claimant had taken the day of the accident off work in order to go shopping with his family and the automobile accident occurred during this deviation from his regular employment activities. Moreover, respondent argues that because of the conflicting testimony whether claimant had taken the day of the accident off from work, the credibility of the witnesses is of paramount significance. Respondent notes claimant admitted he provided false testimony at his discovery deposition regarding his social security number as well as his citizenship and accordingly, the ALJ's determination that the claimant's supervisor's testimony was more persuasive should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The respondent's main office is located in Wichita, Kansas, but employees are required to travel to other locations to perform work for the respondent. Travel to job sites is a required element of employment with respondent.

The claimant was employed as an insulation installer for respondent. Claimant was staying at the Raceway Inn in Topeka, Kansas, while working at the Jeffries plant outside of St. Mary's, Kansas. Claimant was provided per diem of \$40 a day but was not otherwise reimbursed for travel expenses.

Claimant noted that he would generally work every Sunday. At the conclusion of his work day on Saturday, October 13, 2001, claimant met with his supervisor, Juan Lopez. Mr. Lopez told claimant that on Monday at 7 a.m. he was to report to a work site in Russell, Kansas. Claimant testified that he did not work at the St. Mary's plant on Sunday because he was to travel to Russell, Kansas. Claimant testified that nothing further was discussed and he went to the hotel where he was staying.

Claimant's supervisor, Juan Lopez, testified that the job at the plant near St. Mary's, Kansas, was nearing completion and that was the reason claimant was being returned to the work site in Russell, Kansas. Mr. Lopez agreed that he had a conversation with claimant the evening of Saturday, October 13, 2001, and that he told claimant he was to report to work on the following Monday at 7 a.m. in Russell, Kansas.

Mr. Lopez further testified that he never told claimant to take Sunday to drive to Russell, Kansas. Instead, Mr. Lopez noted claimant should have been working Sunday at the St. Mary's location but had asked for the day off so he could take his family shopping. Mr. Lopez further noted the time sheet indicated claimant did not work and was not paid for Sunday, October 14, 2001.

Claimant denied he requested Sunday, October 14, 2001, off so he could go shopping in Topeka with his family. Claimant further denied he went shopping in Topeka on Sunday before the automobile accident.

Claimant spent Saturday night at the hotel with his family who were visiting him that weekend in Topeka. Claimant testified the next morning they packed and immediately left for Russell, Kansas. Claimant testified that en route to the highway to go to Russell, Kansas, he did not see a stop sign and collided with another vehicle at the intersection at S.E. 37th Street and S.E. California.

Mr. Lopez noted that he expected claimant to take his family home to Lyons, Kansas, sometime on Sunday and then go to work at Russell, Kansas, the next day because that is what claimant had done in the past when working in Russell, Kansas. Mr. Lopez concluded that although claimant was expected to report to work at Russell, Kansas, on Monday, if he couldn't make it all he was required to do was call and the job would have waited for him the next day.

The ALJ made the following findings:

The evidence establishes that Claimant normally worked Sundays, but did not work on Sunday, October 14, 2001. Juan Lopez testified that Claimant requested Sunday off to spend with his family. The Court concludes that the greater weight of the evidence establishes that Claimant took Sunday, October 14, 2001, off to spend shopping with his family in Topeka and that the accident occurred in the context of shopping and spending time with his family, not while Claimant was driving to Russell to continue his employment with Respondent.

Implicit in the findings made by the ALJ is the determination that the testimony of Mr. Lopez was more credible than claimant. The ALJ also must have discounted claimant's testimony that he was proceeding directly to the highway that would take him to Russell, Kansas, when the automobile accident occurred. It is significant that the ALJ observed the in-person testimony of the witnesses and apparently did not believe the claimant. The Board generally gives some deference to an ALJ's evaluation of the credibility of witnesses whom he or she had the opportunity to observe while testifying.

Kansas has long recognized as compensable an injury suffered during travel to the job when the operation of a motor vehicle on public roadways is an integral part of the employment or is inherent in the nature of the employment or is necessary to the employment, so that in his travels the employee was furthering the interests of his employer.¹ Respondent and its insurance carrier concede that travel between job sites was a job requirement for claimant and accordingly a necessary or integral part of the employment.

However, substantial deviations from the business purpose of any trip may defeat a claim for workers compensation benefits.² In determining whether claimant's accidental injury arose out of and in the course of his employment, the Board must consider whether the deviation by claimant was sufficient to find that claimant had abandoned the employer's business for personal reasons, thus causing a denial of benefits to be proper. In Larson's *Workers' Compensation Law*, § 17.01, the majority rule is that an identifiable deviation from a business trip for personal reasons takes the employee out of the course of employment

¹ *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P. 2d 556 (1984).

² *Kindel v. Ferco Rental, Inc.*, 258 Kan 272, 899 P.2d 1058 (1995).

until the employee returns to the route of the business trip, unless the deviation is so small as to be disregarded as insubstantial. A common variation of this rule is the side trip, which occurs somewhere along the course of the main journey, when the main journey is intended as a business journey and a side-trip is of a personal nature. Larson's, § 17.03[3], describes the majority rule as until the side-trip is completed, the deviation for personal reasons would cause a denial of benefits. Larson's, § 17.03[6].

Kansas has long recognized the principle that where the business errand is finished or abandoned and the worker sets about the pursuit of his own pleasure or indulgence, the employer is not liable for compensation.³ Only those accidents that arise out of and in the course of employment are compensable under the Workers Compensation Act.⁴

For an accident to arise out of employment, there must be a causal connection between the accident and the nature, conditions, obligations, or incidents of the employment.⁵ The requirement that the accident occur in the course of employment relates to the time, place, and circumstances under which the accident occurred and means the accident happened while the worker was working for the employer.⁶ In *Newman*, the Kansas Supreme Court held:

The two phrases, arising 'out of' and 'in the course of' the employment, as used in our workmen's compensation act (K.S.A. 1972 Supp. 44-501), have separate and distinct meanings, they are conjunctive and each condition must exist before compensation is allowable. The phrase 'in the course of' employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase 'out of' the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises 'out of' employment if it arises out of the nature, conditions, obligations and incidents of the employment.⁷

³ *Woodring v. United Sash & Door Co.*, 152 Kan 413, 103 P.2d 837 (1940).

⁴ See K.S.A. 44-501.

⁵ See *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973); *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980); and *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

⁶ See *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 197, 198, 689 P.2d 837 (1984).

⁷ *Newman*, *ibid.*, Syl. ¶ 1.

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to the particular case.⁸

The Board's review of the record suggests it is reasonable to rely on the ALJ's determination of credibility in this case and doing so the Board concludes the Order should be affirmed. The claimant testified he was staying at the Raceway Inn in Topeka. It appears that if claimant had immediately left for Russell, Kansas, from the motel, as he testified, the most direct route would not have taken claimant to the location where the automobile accident occurred.

The Board concludes that at the time of the accident claimant was not driving to the next job site designated by respondent but, instead, was traveling in Topeka to engage in shopping with his family. Accordingly, the accident was neither causally related to claimant's work activities nor did it occur while claimant was furthering respondent's business interests.⁹

Because claimant has failed to prove that the accident arose out of and in the course of claimant's employment, the request for benefits must be denied.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bruce E. Moore dated October 7, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2003.

BOARD MEMBER

c: Matthew L. Bretz, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge
Director, Division of Workers Compensation

⁸ *Newman, ibid.*, Syl. ¶ 3, citing *Carter v. Alpha Kappa Lambda Fraternity*, 197 Kan. 374, 417 P.2d 137 (1966).

⁹ *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).